Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo

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"Now I'll give you something to believe [said the Queen]. I'm just one hundred and one, five months and a day."

"I can't believe *that!*" said Alice.

"Can't you?" said the Queen in a pitying tone. "Try again; draw a long breath, and shut your eyes."

Alice laughed. "There's no use trying," she said; "one can't believe impossible things."

"I daresay you haven't had much practice," said the Queen.

—Lewis Carroll, *Through the Looking Glass.*

Introduction

In resolving the problems created by the diversity of state laws in a federal nation, the Supreme Court of the United States has for more than three decades consistently adopted an analysis in terms of the governmental interests of the states concerned.[1] Over the years the Court has evolved the rule that a state court is constitutionally[2] free to apply its local law and policy to any case (or type of case) in which the forum state has a legitimate governmental interest.[3] A legitimate governmental interest requires the concurrence of a governmental policy and an appropriate relationship between the state having the policy and either the parties, the facts giving rise to the litigation, or the litigation process itself.

For example, the Texas citizenship of the insured was held to give Texas a sufficient governmental interest to enforce its law and policy avoiding contracts of life insurance where the beneficiaries lacked an insurable interest in the life of the insured. Texas was free, said the Supreme Court, to enforce a "policy which protects citizens against the assumed dangers of insurance on their

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1. The governmental interest analysis dates from the decision in Alaska Packers' Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935). The Court had also made use of this analysis explicitly and intuitively in earlier cases, See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 12, 35–47 (1958). The author is deeply indebted to that article and to the late Professor Currie's earlier study, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620 (1954), for essential background information and illuminating insights.

2. *I.e.*, within the limits established by the full faith and credit clause and the due process clause of the fourteenth amendment. Since the operation of these two clauses in choice-of-law cases is almost the same (the due process clause can be involved when a foreign country has a governmental interest and the forum has none), the ensuing discussion is confined to the full faith and credit clause.

3. See Carroll v. Lanza, 349 U.S. 408 (1955).

lives held by strangers."[4] On the other hand, the Court held that Arkansas had a sufficient governmental interest to apply its own law with regard to a nonresident's liability for personal injuries suffered by another nonresident while both were temporarily present in the state of Arkansas.[5] But there is a consequential corollary to this permissive principle; where a state other than the forum has a legitimate governmental interest in the case before the court and the forum has *none*, full faith and credit must be given to the law of the other state.[6] To enforce the law of the forum under such circumstances would constitute an officious intermeddling with the concerns of another state.

In sharp contrast with these rules stands the Supreme Court's refusal to review the decision of the Supreme Court of Texas in *Toledo Soc'y for Crippled Children v. Hickok*[7] applying Texas law to a case in which Ohio had a very substantial interest and Texas had none at all. By a will executed a few months before his death a wealthy citizen of Ohio had devised valuable mineral estates to a group of charitable institutions operating only in that state. He was survived by two children also domiciled in Ohio. Ohio had a deathbed-gift law designed to protect wealthy decedents against overzealous attempts to persuade them during their last days to give their wealth to charitable institutions.[8] Under this law the devise in question would have been invalid, and the mineral estates would have gone to the testator's children. The mineral estates, however, were located in Texas, under whose law the testator would have been permitted to devise them to the charities. In short, the parties were all Ohioans; the sole ground for the application of Texas law was that the testator was attempting to devise an interest in Texas land.

It is very easy to imagine various types of cases in which the location of the land, standing alone, would have given Texas a sufficient interest to justify the application of its law, but it is impossible to identify any such interest in the *Hickok* case. For example, if the testator had directed that the land be put to some economic use prohibited by Texas law, Texas clearly would have had a legitimate interest in enforcing the prohibition for the benefit of the other members of the Texas community. Texas would also have had a sufficient interest if the testator had tried to create remote future interests in Texas land contrary to the Texas version of the Rule Against Perpetuities; such remote interests might have prevented the sale of the land, to the detriment of the entire Texas com-

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4. Griffin v. McCoach, 313 U.S. 498, 507 (1941). "Likewise it is for Texas to say whether its public policy permits a beneficiary of an insurance policy on the *life of a Texas citizen* to recover where no insurable interest exists in the beneficiary." *Id.* at 503. (Emphasis added.)

5. Carroll v. Lanza, 349 U.S. 408 (1955).

6. See John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); New York Life Ins. Co. v. Head, 234 U.S. 149 (1914). For a discussion of these cases see Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 38–39, 43–44, 46–47 (1958).

7. 152 Tex. 578, 261 S.W.2d 692 (1953), *cert. denied*, 347 U.S. 936 (1954). For a detailed analysis of this case see Hancock, *"In the Parish of St. Mary le Bow, in the Ward of Cheap,"* 16 STAN. L. REV. 561–74 (1964).

8. "Such restrictions are based on grounds of public policy. They are to protect testators against themselves in their last moments, as well as against designing persons." Folsom v. Haas, 9 Ohio C.C.R. 473, 483 (1895). Regarding deathbed-gift laws and other restrictions on testamentary gifts to charities see Joslin, *Legal Restrictions on Gifts to Charities*, 21 TENN. L. REV. 761 (1951).

munity. If the testator had devised Texas land to a charitable institution operating in Texas for the benefit of Texans, this circumstance also would have given Texas a legitimate interest in seeing that the charity got the land.

In each of these hypothetical examples the policy of the Texas law would have been directed to the actual use of the land or to the free circulation of the land in the market; hence Texas would have had an interest in the enforcement of its law. But the Texas law involved in the *Hickok* case was not a law of this type. While the Ohio law was designed to protect wealthy Ohio decedents from being imposed upon, the Texas law was designed to give Texas decedents a larger measure of freedom to dispose of their property by will. Texas, therefore, had no interest in the gift of an Ohioan to Ohio charities, but Ohio had a rather substantial interest in throwing the protective arm of its statute around its dying citizen.

Why, then, did the Supreme Court of Texas insist on applying Texas law to a case in which Texas had no legitimate governmental interest? A passage in the opinion strongly suggests a belief that a Texas court disposing of Texas real property ought to uphold the Texas policy of carrying out the testator's intentions regardless of the policy of his domicile.[9] One wonders what the Texas judges would have expected an Ohio court to do in the converse case of a wealthy Texan devising a valuable estate in Ohio lands to Texas charitable institutions. In such a case the teaching of the *Hickok* opinion would require the Ohio court to assist the Texas testator's children (even though domiciled in Texas) in breaking their father's will and enriching themselves at the expense of the Texas charities. This absurd result, though clearly required by the principle of the *Hickok* case that the domestic policy of the forum-situs must be enforced in *every* case involving title to local land, would likewise be inconsistent with the constitutional rules laid down by the Supreme Court.

Is there any plausible way to reconcile the denial of certiorari in the *Hickok* case with the rules evolved by the Supreme Court? A commentator who was extremely anxious to effect such a reconciliation might argue that one of the policies of the Texas law conferring greater testamentary freedom is to encourage nonresidents to invest their money in Texas land by bestowing this freedom upon them.[10] Thus he would say that Texas had an interest in the application of this

9. Shortly before his death the testator had entered into a written contract by which his mineral estates were to be transferred to corporations in exchange for stock in the corporations. His will directed his executors to carry out this contract, which had not been performed at the time of his death. To avoid the application of Texas law, counsel for the children contended that the contract and will worked an equitable conversion of the mineral estates into personal property, the transfer of which should be governed by the law of the testator's domicile, Ohio. Relying on various text writers, the court rejected this contention and said: "If this view [that Texas law governs] should impress some as legalistic in the sense of excluding the intent of the testator that his mineral interest should become corporate stock, it is hardly more of a 'technical' approach than that of regarding 'as done' that which was *not* done, in order to deprive the petitioners of the last remnant of benefits the testator obviously intended them to have, and, in effect, to enforce here a legislative policy of Ohio, *which is contrary to the policy of our own Legislature*." 152 Tex. at 593, 261 S.W.2d at 702. (Emphasis added.)

10. Skepticism regarding the existence of such a policy may be engendered by the following observations:

(1) Substantial capital investment in Texas would normally take a corporate form consisting of stocks of corporations operative there. Such stocks would constitute movable property whose transmission on death would be governed by the law of the testator's domicile.

(2) Assuming a capitalist in one of the twelve states restricting gifts to charity desired to evade

law to cases involving nonresident testators. Or, taking a bolder stance, he might simply assert that a state must *always* have (or be conclusively presumed to have) a legitimate governmental interest in any case in which the title to its land is at stake. One is inclined to suspect, however, that the thoughtful student of conflict of laws would find these purported reconciliations reminiscent of Alice's difficulty in believing impossible things.

For the denial of certiorari in the *Hickok* case there is a simple historical explanation: the four fatal cases of *Clarke v. Clarke*,[11] *Fall v. Eastin*,[12] *Olmsted v. Olmsted*,[13] and *Hood v. McGehee*.[14] The first two of these cases involved full faith and credit to judgments only and all of them were decided between 1900 and 1915, twenty years before Chief Justice Stone articulated the governmental interest analysis, which in subsequent cases has provided the conceptual framework for the established doctrine of full faith and credit to foreign laws.[15] The teaching of these four cases is hopelessly inconsistent with that doctrine; sooner or later the Supreme Court will have to reconsider them in the light of subsequent developments.

With a view to such future reconsideration, and because of their current importance in state courts (the *Hickok* opinion relied heavily upon *Clarke v. Clarke*), it is the purpose of this Article to analyze each of these cases in terms of governmental interests, to probe the reasoning on which they are founded, and to evaluate them as precedents for the future. Before the cases themselves are considered, a brief sketch of the preceding historical development may contribute to a clearer understanding of them.

I. Historical Development of the Land Taboo

It was not until the end of the eighteenth century that English courts reluctantly began to adopt foreign law as a rule of decision in cases involving torts or breaches of contract.[16] At this time the House of Lords also held that the personal property of a nonresident intestate should be distributed according to the law of his domicile.[17] But for various historical reasons English lawyers of that era simply assumed that testate or intestate succession to English land must always be governed by English domestic law.[18] The extreme example of this re-

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the restrictions, several well-tried and effective devices are available for doing so without transferring funds to Texas enterprises. The policy suggested, therefore, would be hopelessly ineffective.

(3) The real interest of Texas is not to make futile attempts to help foreign testators evade their domiciliary laws but rather to cooperate with other states to the end that Texas testators may freely dispose of their land in other states.

11. 178 U.S. 186 (1900).

12. 215 U.S. 1 (1909).

13. 216 U.S. 386 (1910).

14. 237 U.S. 611 (1915).

15. Alaska Packers' Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935).

16. Cheshire, Private International Law 36–37 (7th ed. 1965).

17. Balfour v. Scott, 6 Brown Parl. Cas. 550, 2 Eng. Rep. 1259 (H.L. Scot. 1793); Bruce v. Bruce, 2 Bos. & Pul. N.R. 299, 126 Eng. Rep. 1251 n.(a) (H.L. Scot. 1790).

18. This is explained principally by the fact that English common-law courts, enforcing English common law and various English statutes, had from time immemorial maintained exclusive jurisdiction over succession to legal estates in English lands. Succession to personal property, on the other hand, had long been subject to the control of the ecclesiastical courts and Chancery. Moreover, since foreign courts might be able to collect and distribute debts by subjecting the debtor or his assets to their process,

sistance to foreign law where English land was concerned is *Birtwhistle v. Vardill*, decided by the House of Lords in 1840 after prolonged consideration.[19] It was there held that a domiciled Scotsman, the son of a domiciled Scotsman, could not inherit English land from his father because he had been born out of wedlock, although the subsequent marriage of his parents had made him a legitimate heir of his father for all purposes under Scottish law.

Such rigid adherence to the law of the situs in all matters of succession to interests in land was likely to prove a most inconvenient doctrine in the United States where land was an important form of wealth and the same person might own land in several states. To be completely effective, the will of such a person would have to comply with the formal requirements of every state in which his land was located[20] and might then receive a different construction in each state. If he died intestate, he might have a different heir or heirs for each state. It is not surprising that American courts and legislatures rejected, in various particulars, the rigid and simplistic English doctrine. Beginning with an Ohio statute of 1805,[21] the legislatures of various states enacted laws that sustained the validity of wills complying with the law of the place of execution or in some states with the law of the testator's domicile.[22] One of the first model uniform laws recommended to the states for adoption by the Commissioners on Uniform State Laws was a statute of this type.[23]

The specific holding of *Birtwhistle v. Vardill* was followed in a few states,[24] but the majority of American courts avoided adherence to the law of the situs by classifying the issue as one of personal status rather than one of inheritance and referring it to the law of the child's domicile at birth or the law of the father's domicile at the time of the legitimizing acts.[25] In construction cases, where a testator's will was silent upon an important question affecting the disposition of his real property, some courts avoided a mechanical and purposeless reference to the law of the situs by using a bold legal fiction. They held that the testator intended (or should be presumed to have intended) the law of his domicile to de-

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it seemed desirable to cooperate with them in establishing a uniform rule. See Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1102–05 (1965).

19. The case was first argued before the judges and the House of Lords in 1830, at which time the judges gave an opinion per Chief Baron Alexander against the claim of the son born out of wedlock. Nothing further was done until 1835, when the matter was discussed by several members of the House and ordered to be reargued before the judges. 2 Clark & Fin. 571, 6 Eng. Rep. 1270 (H.L. 1835). A reargument took place in 1839, and, on hearing the opinion of the judges delivered by Chief Justice Tyndal in accord with the opinion of 1830, the House rendered its final judgment to the same effect in 1840. 7 Clark & Fin. 895, 7 Eng. Rep. 1308 (H.L. 1840).

20. "Perhaps nothing has shaken the respect of even intelligent laymen for the wisdom of the law more than the fact that a will will pass real estate in one State and be utterly null and void as to that in an adjoining State. Most attorneys in active practice have doubtless realized the difficulties arising from so many statutes on the subject in force in this country, when called upon to hastily draw a will for a person who owned real estate in different States . . . ." Lindsay v. Wilson, 103 Md. 252, 271, 63 Atl. 566, 569 (1906). A similar comment was made in Castens v. Murray, 122 Ga. 396, 50 S.E. 131 (1905).

21. Ohio Laws 1804–1805, ch. 27, § 2, at 174.

22. For a description and classification of these statutes see Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221, 255–56 (1944).

23. See 4 RABEL, CONFLICT OF LAWS, A COMPARATIVE STUDY 295–96 (1958).

24. *E.g.*, Lingen v. Lingen, 45 Ala. 410 (1871); Smith v. Derr's Adm'rs, 34 Pa. 126 (1859).

25. The leading nineteenth-century case was Miller v. Miller, 91 N.Y. 315 (1883). The older cases are collected in Annot., 73 A.L.R. 941 (1931).

termine the construction of his will.[26] In a variety of cases where the enforcement of the law of the situs would have produced unpalatable results courts avoided such results by finding that an interest in land had been equitably converted into personal property.[27] This fallacious but convenient escape device permitted the courts to adopt a different choice-of-law formula, one appropriate to the transfer of personal property.

While pursuing these tactics of evasion in certain types of cases, American courts continued to pay a most exaggerated deference to the broad formula that purported to subject all questions concerning land titles to the law of the situs. This attitude was doubtless due in part to Mr. Justice Story's uncritical adherence to the extreme English view in his influential treatise.[28] It is also very probable that some American judges suffered from an inarticulate "anxious fear" that a liberal acceptance of foreign law might undermine the policy of local recording systems and create clouds on titles.[29] A forthright functional analysis clearly distinguishing between those rules of the forum-situs that, because of their policy and effect, ought to be enforced in all cases and those that might give way in favor of the law

26. See Guerard v. Guerard, 73 Ga. 506 (1884); Keith v. Eaton, 58 Kan. 732, 51 Pac. 271 (1897); Bolling v. Bolling, 88 Va. 524, 14 S.E. 67 (1891). For other cases and dicta see Annot., 79 A.L.R. 91 (1932).

27. West Va. Pulp & Paper Co. v. Miller, 176 Fed. 284 (4th Cir. 1909); Estate of Skerrett, 2 Coffey Prob. Dec. 235 (Cal. Prob. Ct. 1888); Ford v. Ford, 80 Mich. 42, 44 N.W. 1057 (1890); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Chamberlain v. Chamberlain, 43 N.Y. 424 (1871); see Jenkins v. Guarantee Trust & Safe Deposit Co., 53 N.J. Eq. 194, 32 Atl. 208 (Ct. Err. & App. 1895) (similar escape device). For discussion of these and other cases see Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1111–27 (1965); Hancock, *"In the Parish of St. Mary le Bow, in the Ward of Cheap,"* 16 STAN. L. REV. 561, 578–85, 612–13 (1964).

28. See STORY, COMMENTARIES ON THE CONFLICT OF LAWS 361, 363, 369–70, 383, 398–99, 404–05 (1st ed. 1834). Though his book was intended to introduce common-law judges and practitioners to foreign doctrines, Story deeply mistrusted the foreign doctrine that the validity of deeds and wills might be sustained if they complied with the forms of the place of execution. "They [foreign jurists] seem wholly to have overlooked, on the other side, the inconvenience of a nation suffering property, locally and permanently situate within its territory, to be subject to be transferred by any other laws, than its own; and thus introducing into the bosom of its own jurisprudence all the innumerable diversities of foreign laws, *to regulate its own title to such property*, many of which laws can be but imperfectly ascertained, and many of which may become *matters of subtile controversy*." *Id.* at 373. (Emphasis added.) "The common law has wisely adhered to the doctrine, that the title to real property can pass only in the manner, and the forms, and to the extent, allowed by the local law. It has thus *cut off innumerable disputes*, and given simplicity, as well as uniformity, to its operations." *Id.* at 377. (Emphasis added.)

29. This "anxious fear" has been detected by Barbour and Currie in the cases involving full faith and credit to foreign judgments affecting land titles. See Barbour, *The Extraterritorial Effect of the Equitable Decree*, 17 MICH. L. REV. 527 (1919); Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 627–28, 632–34, 638–39 (1954). It appears also in choice-of-law cases. See, *e.g.*, Nelson v. Potter, 50 N.J.L. 324, 326, 15 Atl. 375, 376–77 (1888). And see text accompanying note 61 *infra*. For expression of the same idea by commentators see MINOR, CONFLICT OF LAWS 28–29 (1901); Hening, *Is the Construction of Wills Devising Real Estate Governed by the Rules of Construction of the Domicil of the Testator or by the Rules of the Situs of the Property?*, 41 AM. L. REG. (n.s.) 718, 733 (1902).

The application of foreign law normally occurs in the course of a judicial proceeding at the situs. When the foreign law has been applied and the judgment rendered accordingly, that judgment will be an indisputable muniment of title, showing the title on the public records vested in the successful party. It is difficult to see how, in such a case, the use of foreign law could render the title uncertain. Where, however, a purchaser or mortgagee taking title to land has relied upon a rule of situs domestic law as determinative of the construction or effect of a will or other instrument in the chain of title, that rule of situs law should always be applied so far as necessary to protect the purchaser or mortgagee or his successors in interest. In such a context the rule serves the purpose of protecting purchasers and facilitating the transfer of titles. But there is no reason why such a rule should be applied in the usual case of litigation between mere gratuitous transferees claiming under a testator or donor. See Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 IND. L.J. 293, 297 (1955).

of decedent's domicile would have been very helpful, but such an analysis was not forthcoming from either judges or commentators. At the turn of the century American judges, while paying lip service to the situs formula, contrived to avoid it in practice through a variety of escape devices when that course seemed to accord with their intuitive sense of the policies of local and foreign rules of law.

II. Supreme Court Recognition of the Land Taboo

A. *Clarke v. Clarke*

Against this somewhat confusing background the case of *Clarke v. Clarke*[30] came before the Supreme Court in 1900. Mrs. Henry P. Clarke, a wealthy heiress and granddaughter of P. T. Barnum, died domiciled in South Carolina survived by her husband and two infant daughters, Nancy and Julia, all domiciled in that state. At her death she owned considerable personal estate and valuable real property located in South Carolina, Connecticut, New York, and Kansas. By her will, after several pecuniary legacies, she gave the entire residuary estate, real and personal, to her husband and daughters in equal shares. The husband was directed to hold the daughters' shares in trust until they reached the age of twenty-five "and then to pay the whole sum over" to each of them respectively. Four months after Mrs. Clarke's death Julia, the younger daughter, died aged eighteen months and, of course, intestate, thus creating one of those situations that make the situs formula seem so absurd. Under the law of South Carolina Julia's equitable interest in the real property devised by her mother would have gone to Nancy and her father in equal shares. Under the law of New York it would have gone to her father for life with remainder to Nancy. Connecticut would have given Julia's entire share to Nancy, while Kansas would have given it all to the father.[31]

From the point of view of governmental interest analysis, South Carolina had a most substantial interest, while the other states had none. When a state legislature enacts a statutory scheme of intestate distribution it in effect makes wills for those of its citizens who choose not to make their own. In deciding what share a widow should receive or whether kindred of the half blood and adopted or illegitimate children should participate, a legislature will naturally be guided by the customs and popular sentiments of the local community. It will try to achieve a result which would be most likely to satisfy the average member of that community.[32] When a state undertakes to distribute the property of a helpless infant (a ward of the state) between her father and sister who are also citizens of that state, it surely has a governmental concern of a very high order. On the other hand, it is impossible to see what interest the people of Connecticut could have had in giving all the Connecticut real property to Nancy or what interest the people of Kansas could have had in excluding Nancy and giving all the Kansas real property to her father. By modern standards, such dispositions of the Kansas and Connecticut real property would have constituted officious intermeddling

30. 178 U.S. 186 (1900).
31. See Clarke v. Clarke, 46 S.C. 230, 238, 24 S.E. 202, 204–05 (1896).
32. See Atkinson, Wills §§ 6, 19 (1st ed. 1937); Rheinstein, Cases on Decedents' Estates 21 (1st ed. 1947).

with the personal affairs of the Clarke family, as regulated by the laws of South Carolina.[33]

Though lawyers of the late nineteenth century did not analyze their problems in terms of governmental interests, they occasionally made use of a closely analogous technique of statutory construction.[34] Moreover, when it was necessary to get around the situs formula, they had at their command some crude but effective tools. One of these, as we have noted, was the doctrine of equitable conversion. The Supreme Courts of South Carolina[35] and Connecticut[36] both agreed that if Mrs. Clarke's will had contained a direction that all her real property be sold, Julia's share would have devolved as personalty according to the law of South Carolina,[37] but her will did not contain such a direction. There was, however, a convenient doctrine, supported by Pennsylvania cases, that if a testator blended real and personal property, as Mrs. Clarke's will did, so as to show he intended to create a common fund and to bequeath the fund as money, an intention that the realty be converted into personalty might be *implied* from the terms of the will.[38] In the *Clarke* case the propriety of this construction was further fortified by the use of the words, "pay the whole sum," in relation to the final transfer to the daughters of their shares.

As executor and trustee under his wife's will, Henry P. Clarke began an action in the South Carolina courts praying a construction thereof. Nancy, who was then six years old, was made defendant and appeared by her guardian *ad litem* appointed by the court. The Supreme Court of South Carolina held, affirming the trial judge, that the language of Mrs. Clarke's will indicated an intention that all her real property be converted into money and that her will therefore worked an equitable conversion of her realty into personalty as of the time of her death. Both the supreme court and the trial judge pointed out that an equal division of Julia's share between her father and Nancy as personalty governed by South Carolina law would carry out the testatrix's manifest intention that father and daughters share equally under all circumstances.[39]

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33. The reasons why American courts in the position of the Kansas and Connecticut courts have usually enforced the law of the forum-situs are: (1) the relative rarity of the cases, which has caused judges and practitioners to rely heavily upon the commentators; (2) the uncritical acceptance of the traditional English attitude by American commentators, beginning with Story, see note 28 *supra*; and (3) the vague, incoherent fear that the introduction of a novel doctrine into the law of real property might disturb vested rights or unsettle the security of titles, see note 29 *supra*.

34. See Hancock, *"In the Parish of St. Mary le Bow, in the Ward of Cheap,"* 16 STAN. L. REV. 561, 574–96 (1964).

35. Clarke v. Clarke, 46 S.C. 230, 24 S.E. 202 (1896).

36. Clarke's Appeal, 70 Conn. 195, 39 Atl. 155 (1898).

37. This conclusion was supported by the equitable conversion doctrine of the cases cited in note 27 *supra* and, more specifically, by the dictum of the Supreme Court of Pennsylvania that if a certain devise had worked an equitable conversion, the beneficiary's interest in the land devised would have devolved in case of his intestacy according to the law of his domicile. Page's Estate, 75 Pa. 87, 95 (1874) (dictum). For modern examples see Duckwall v. Lease, 106 Ind. App. 664, 674, 20 N.E.2d 204, 209 (1939); Poore v. Poore, 226 Ky. 668, 675, 11 S.W.2d 721, 724 (1928).

38. "[I]n order to work a conversion, there must be either . . . 3d. Such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money." Hunt's Appeals, 105 Pa. 128, 141 (1884) (dictum); *accord*, Marshall's Estate, 147 Pa. 77, 23 Atl. 391 (1892) (per curiam).

39. Clarke v. Clarke, 46 S.C. 230, 233, 242, 24 S.E. 202, 203, 206 (1896). The Supreme Court of South Carolina also indulged in a little fiction. "The testatrix must be presumed to have known that, under the laws of this State, . . . in the event of the death of either husband or child, or children, the estate of the one so dying intestate would be shared equally by the two survivors, *whether the estate was realty or personalty*." *Id.* at 242, 24 S.E. at 206. (Emphasis added.) In the light of our analysis of

Having been appointed administrator of his daughter Julia's estate by a Connecticut probate court, Henry P. Clarke made application to that court for directions regarding the distribution of her beneficial interest in Connecticut land held in trust for her under her mother's will. Nancy was represented in this proceeding by a new guardian *ad litem* appointed by the Connecticut court, and Henry P. Clarke was made a party in his own right to claim a share of Julia's estate. From an unfavorable decree of the probate court, giving Julia's entire share to Nancy, he appealed to the Supreme Court of Connecticut. That court agreed with the South Carolina courts that if Mrs. Clarke's will worked an equitable conversion of her real property into personal property, Julia's interest in Connecticut land should be distributed according to South Carolina law. The court declined, however, to accept the South Carolina judgment as a conclusive adjudication of the construction of the will, binding upon Nancy and her father.[40] The Connecticut court also declined to adopt the South Carolina law as the proper law to govern the construction of the will. Instead of the easygoing South Carolina doctrine of equitable conversion (imported from Pennsylvania) the court followed a stricter rule, which only recognized an equitable conversion by implied direction to sell in cases where the terms of the will could not be carried out without a sale of the real property.[41] Thus the court concluded that Julia's beneficial interest in Connecticut land was not personal property but real property, which devolved at her death according to Connecticut law upon her sister Nancy alone.[42]

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the policies of the intestacy statutes and the governmental interests of the states, one is inclined to suspect that the South Carolina judges felt they were justified in stretching the doctrine of equitable conversion a little to persuade the courts of the situs states to apply South Carolina law.

40. The Connecticut court held that because Henry P. Clarke was not a party to the South Carolina proceedings in his own right he would not have been bound in his own right by an unfavorable decree in those proceedings. Clarke's Appeal, 70 Conn. 195, 208, 39 Atl. 158, 159 (1898). This position was fully supported by the United States Supreme Court's decision in Carpenter v. Strange, 141 U.S. 87 (1891). On the principle that the estoppels of a judgment must be mutual, it followed that Nancy was not bound by the South Carolina decree either. Moreover, the estate of Julia, the deceased beneficiary, had not been represented in the South Carolina proceedings. Clarke's Appeal, *supra* at 212, 39 Atl. at 160. These were the Connecticut court's chief reasons for not according full faith and credit to the South Carolina decree. "It is unnecessary to inquire whether, if he [Henry P. Clarke] had been a party individually to the South Carolina suit, and the principal administrator of the estate of Julia Clarke had also been brought in, the court would have had jurisdiction to make a final and conclusive determination as to the effect of the will upon lands in other States and their descent upon the decease of those in whose favor the testatrix disposed of them." *Id.* at 212–13, 39 Atl. at 160. Other passages in the opinion, however, suggest that the South Carolina decree was construed not to have adjudicated the construction of the will so far as it affected Connecticut land. *Id.* at 211–12, 39 Atl. at 160.

41. "The claim is made, and is not wholly without countenance in reported cases, that an intent to convert may be implied, in the absence of any positive direction to sell *or of any absolute necessity to sell*, if the will so blends together real and personal estate as clearly to show that the testator meant to create a common fund out of both, and to bequeath it as money. [Citation to the Pennsylvania equitable conversion doctrine.] . . . No general residuary devise and bequest can be given such an effect, as respects lands in Connecticut, unless from the *whole scheme of the will* or the particular language employed a power to sell is clearly implied." *Id.* at 217, 39 Atl. at 162. (Emphasis added.)

42. Since other courts of that era used the doctrine of equitable conversion to carve out an exception to the situs formula when another law seemed more appropriate and since the Connecticut court was willing to do the same thing, one is inclined to wonder why it was unwilling to stretch that doctrine a little in order to refer the whole question to the law and policy of the parties' domicile, which alone had a substantial interest in the matter. There is, however, a strong tradition that a law which protects the rights of an infant should be strictly enforced in favor of the infant, and the *Clarke* case involved the rights of Nancy B. Clarke, who was only six years old. The passage from the opinion quoted in note 41 *supra* suggests that the court thought the South Carolina court had indeed stretched the doctrine of equitable conversion. The Connecticut court might have avoided responsibility for the stretching by adopting the fiction that a testator normally intends the law of the domicile to govern the construction of his will. But since the court had already held that the South Carolina court's con-

In the Supreme Court of the United States it was not contended that the Connecticut court had denied full faith and credit to the law of South Carolina respecting equitable conversion or the construction of wills.[43] The sole ground of attack upon the Connecticut judgment was that it denied full faith and credit to the judgment of the South Carolina court as a conclusive adjudication of the construction of the will. In rejecting this contention, the Supreme Court relied upon two grounds of decision, one of which was relatively narrow. Nancy, who was then only six years old, had been represented by a guardian *ad litem* appointed by the South Carolina court for the proceedings in that state. "It cannot be doubted," wrote Mr. Justice White, "that the courts of a State where real estate is situated have the *exclusive right to appoint a guardian* of a non-resident minor, and vest in such guardian the *exclusive* control and management of land belonging to said minor, situated within the State."[44] From this it followed that the guardian *ad litem* appointed by the South Carolina court had no power to act for Nancy so far as the issues in litigation might affect her claim to Connecticut land. So far as its decree might affect that claim the South Carolina court had no jurisdiction over Nancy.

If Mr. Justice White had been content to rest the judgment of the Court on this ground alone, the case would deserve no more than a footnote in the present discussion. But he also rested the judgment upon a much broader ground, which has exercised a most unfortunate influence in subsequent cases:

> It is a *doctrine firmly established* that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. . . . The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that State) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut and therefore is equivalent to *denying the correctness of the elementary proposition* that the law of Connecticut where the real estate is situated governed in such a case. . . . The proposition, when truly comprehended, amounts but to the contention that the laws of the respective States controlling the transmission of real property by will, or in case of intestacy, are operative *only so long as there does not exist in a foreign jurisdiction a judgment* or decree which in legal effect has changed the law of the situs of the real estate.[45]

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struction was not binding upon Nancy and that she was entitled to have the issue reconsidered, it would surely have seemed anomalous to bring that construction back into the case through the choice-of-law door in order to enforce it against her. To reach sensible results in choice-of-law cases courts frequently find themselves compelled to drastically manipulate the crude and promiscuous choice-of-law formula and escape device. To the uninitiated such manipulation sometimes seems slightly improper. Because the rights of an infant were involved, the Connecticut court was unwilling to undertake it.

43. In 1900 it had not yet become fashionable to argue that the full faith and credit clause compelled a state to apply the statutory or decisional law of another state. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 35–39 (1958).

44. Clarke v. Clarke, 178 U.S. 186, 193 (1900). (Emphasis added.) The court quoted a passage from its earlier decision in Hoyt v. Sprague, 103 U.S. 613 (1881), as authority upon this question.

45. 178 U.S. at 190–91. (Emphasis added.)

In the light of our brief historical survey, how should we characterize this "firmly established doctrine," so "elementary" that its correctness ought not to be denied? In the first place, it was an historical anachronism, derived in part from the centuries-old distribution of power among English courts.[46] At the time of the *Clarke* case it was a mere textbook aphorism that did not accurately represent the practice of American courts[47] or legislatures. Sixteen state legislatures (including that of Connecticut[48]) had abandoned it as a criterion for the validity of wills.[49] Through the nineteenth century, judges had evolved various exceptions and escape devices to evade the exclusionary situs formula, notably the fiction of equitable conversion, which was supposed to justify a different treatment of certain interests in land because they could be classified as personal property.[50] In the *Clarke* case itself the Supreme Court of Connecticut had conceded that if Mrs. Clarke's will had contained an express direction to sell her real property the devolution of Julia's interest in Connecticut land would have been controlled by the law of South Carolina. How can one be expected to believe that the situs formula expresses a policy so fundamental that it overrides the constitutional mandate of full faith and credit to sister-state judgments when the very court which has disregarded that mandate assures us that the situs formula could have been avoided by a few additional words in the testatrix's will?

Possibly Mr. Justice White did not really mean that Connecticut must *always* apply its own law concerning succession to land but rather that because of the nature of territorial sovereignty Connecticut must always remain *free* to apply its own law if it chooses to do so.[51] Put in this form the argument of the opinion still seems dreadfully undiscriminating; granting that there might be cases in which some local land policy affecting Connecticut residents could be frustrated by the enforcement of a sister-state judgment, why must *all* sister-state judgments affecting land be deprived of constitutional protection? More particularly, why should the South Carolina judgment in the *Clarke* case have been deprived of that protection when, as we have seen, South Carolina had a substantial concern in the distribution of family property passing from a South Carolina infant

46. See note 18 *supra*.

47. The five cases cited by the Court as authorities for this "firmly established" doctrine were *not* cases analogous to *Clarke v. Clarke*, in which a state court of the forum-situs had chosen to reject the law of a testator's domicile in construing his will. Four of them were cases litigated in federal courts which necessarily gave the same decision that a state court of the situs state would have given in accord with the rule laid down in Jackson *ex. dem.* St. John v. Chew, 25 U.S. (12 Wheat.) 153 (1827). The Court was indulging in the all-too-familiar but fallacious practice of transplanting a statement of law from a legal context in which certain policies prevail to another context where the policies involved are entirely different. See Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535 (1959). The fifth case, litigated in the courts of the District of Columbia, involved the construction of the will of a testator *domiciled* in the District devising land located there.

48. Conn. Pub. Acts 1856, ch. 44, at 67.

49. See Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1106 n.55 (1965).

50. See authorities cited in and text accompanying note 27 *supra*.

51. Thus, following the passage quoted in the text accompanying note 45 *supra*, he wrote: "This is but to contend . . . that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of a court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time." Clarke v. Clarke, 178 U.S. 186, 191–92 (1900).

decedent to other members of her South Carolina family while Connecticut had no identifiable concern whatsoever? Mr. Justice White's argument overlooked the truly elementary principle that certain local laws, though affecting title to land, have policies that require their application only to cases involving members of the local political community and not to cases involving the relations of nonresidents. On the contrary, his argument assumed without question that if a state did not enforce its local laws in all cases concerning land titles (or at least remain free to do so) its sovereignty would, in some unspecified way, be drastically violated.[52]

B. *Fall v. Eastin*

Fall v. Eastin,[53] decided by the Supreme Court in 1909, had certain features in common with *Clarke v. Clarke*. While the *Clarke* case involved a judgment rendered at the domicile of an intestate that attempted to control the disposition of her foreign real property, the *Fall* case involved a judgment rendered at the domicile of a divorced husband and wife that attempted to control the disposition of foreign real property as part of a general redistribution of all their assets. As in the *Clarke* case the law of the domicile (Washington) differed from that of the situs (Nebraska) on the question at issue. Washington law empowered the divorce court to make "such disposition of the property of the parties . . . as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired . . . ."[54] Acting under this statute, the Washington court, having granted a divorce to Sarah Fall, ordered her husband, Edmund Fall, to convey to her his half interest in 160 acres of Nebraska land of which they were co-owners. After Sarah Fall had obtained possession of the land, Edmund Fall, having refused to convey his share to her, conveyed it instead to his sister Elizabeth Eastin and removed to California. Sarah Fall then sued Elizabeth Eastin in Nebraska to quiet title against her, alleging that Elizabeth's deed from Edmund had been made without consideration and

52. *Clarke v. Clarke* not only antedates the practice of analyzing cases in terms of governmental interests, it also belongs to an era when the Supreme Court was much less reluctant to recognize exceptions to the constitutional and statutory obligation of full faith and credit to sister-state judgments than it has been in recent decades. Only three years after the decision of the *Clarke* case the Court recognized such an exception in Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903), which held that a New York court was not obliged to enforce the judgment of an Illinois court where the action to enforce the judgment was brought by one Illinois corporation against another and where the original cause of action was held by the New York courts to have arisen outside New York. The decision has been subjected to incisive criticism, see Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 268, 272–75 (1959), and has been virtually overruled by Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U.S. 411 (1920).

Less than eight years after the *Clarke* case four Justices of the Court contended in dissent that Mississippi should not be constitutionally obliged to enforce a Missouri judgment because that judgment enforced, as between Mississippi residents, a contract which was illegal and void under Mississippi law. Fauntleroy v. Lum, 210 U.S. 230, 238 (1908) (dissenting opinion). This dissent, written by Mr. Justice White, the author of the *Clarke* opinion, was concurred in by two other members of the *Clarke* court. In short, as a decision upon full faith and credit to judgments, *Clarke v. Clarke* is a pretty old case, coming from a time when the prevailing climate of judicial opinion on the subject of full faith and credit was very different from that of today.

53. 215 U.S. 1 (1909).

54. WASH. REV. CODE ANN. § 26.08.110 (1961).

to defraud Sarah Fall. The Nebraska trial court found these allegations to be true and entered the decree prayed for.[55]

This decree was reversed by the Supreme Court of Nebraska. Under Nebraska domestic law, divorce courts had no power to award the real property of one spouse to the other as "alimony." Noting this minor difference between the laws of the situs and the domicile, the court proceeded to apply the fallacious reasoning of Mr. Justice White in the *Clarke* case to the situation before it:

> The transfer and devolution of title to real estate within the limits of a state is entirely subject to the laws of that state and no interference with it can be permitted by other states. . . . Clarke v. Clarke . . . . Under the laws of this state the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and in such an action have no power or jurisdiction to divide or apportion the real estate of the parties. . . . A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void. . . . We know of no rule which compels us *to give to a decree of the courts of Washington a force and effect we would deny to a decree of our own courts* upon the same cause of action. . . . [W]e are not compelled to recognize a decree affecting the title of E. W. Fall and his grantees . . . where the act directed by the Washington court is in opposition to the public policy of this state in relation to the enforcement of the duty of marital support. . . . [I]t is our duty to sustain the rights of the state to sovereignty over the land within its borders . . . .[56]

What was the policy underlying the Nebraska rule forbidding divorce courts to order a husband to convey real property to his wife? It was clearly not designed to regulate the use of the land or to secure the marketability of titles. As the court itself conceded in the quoted passage, it was a policy "in relation to the duty of marital support." The policy was to be applied in the divorce courts of Nebraska where the litigants would necessarily be Nebraska domiciliaries. To give it the effect of reaching out to encompass a wife and husband domiciled in Washington, whose property was being divided by a court of that state according to its law, was an absurd result which understandably provoked a vigorous and incisive dissent by Chief Justice Sedgwick.[57]

The Nebraska decision was sustained by a majority of the Supreme Court in an opinion remarkable for its strong flavor of confusion, uncertainty, and reluctance.[58] Justices Harlan and Brewer dissented. Mr. Justice Holmes agreed with the dissenters so far as to hold that the Washington decree would have been en-

55. Fall v. Fall, 75 Neb. 120, 124, 113 N.W. 175, 177 (1907).

56. *Id.* at 132–35, 113 N.W. at 180–81. (Emphasis added.) *Clarke v. Clarke* was also cited *id.* at 130, 113 N.W. at 179.

57. In an earlier opinion filed in December 1905 the Supreme Court of Nebraska affirmed the trial court's decision in favor of Sarah Fall. Justice Sedgwick wrote the majority opinion, in which Chief Justice Holcomb concurred. Justice Barnes delivered a short dissent. Fall v. Fall, 75 Neb. 104, 106 N.W. 412 (1905) (2-to-1 decision). In 1906 Chief Justice Holcomb left the court, Sedgwick became chief justice, and Charles B. Letton became the new associate justice. Upon a rehearing the former opinion was withdrawn and a new opinion *reversing* the trial court was filed in July 1907. The opinion was written by Justice Letton and concurred in by Justice Barnes. Fall v. Fall, 75 Neb. 120, 113 N.W. 175 (1907) (2-to-1 decision).

58. Fall v. Eastin, 215 U.S. 1 (1909). For a detailed criticism of this extraordinary opinion see Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 648–65 (1954).

titled to full faith and credit as against Edmund Fall but voted with the majority on the curiously insubstantial ground that the Nebraska court was not obliged to treat Elizabeth Eastin as a privy to that decree even though she had actual notice of it.[59] The majority apparently thought that they were constrained to decide as they did by a line of Supreme Court cases running back to 1832, but Currie's careful analysis has shown that they were entirely mistaken.[60] It is probable, too, that their minds were preyed upon by the "anxious fear" that enforcement of foreign land decrees might frustrate local recording laws and becloud titles,[61] a notion which had been unscrupulously exploited by the Supreme Court of Nebraska.[62]

A thoroughly modern analysis of the problem of *Fall v. Eastin* emphasizing the policies of the domestic laws in force at the situs and the domicile has been provided by the Supreme Court of Texas in the recent case of *McElreath v. McElreath*.[63] The facts of this case were virtually the same as those of *Fall v. Eastin* except that the husband was a party to the proceedings at the situs (Texas) and had made no attempt to transfer his interest. While both spouses were domiciled in Oklahoma an Oklahoma court granted the wife a divorce and ordered the

59. Fall v. Eastin, 215 U.S. 1, 14 (1909) (concurring opinion). This was an insubstantial ground because the Nebraska trial court found that the deed to Elizabeth Eastin was made without consideration and in order to defraud Sarah Fall. Fall v. Fall, 75 Neb. 120, 123–24, 113 N.W. 175, 176–77 (1907). None of the Nebraska judges suggested that Elizabeth Eastin was a purchaser in good faith. None of them suggested that under Nebraska law she was not in privity with Edmund Fall. The ground of the majority opinion was that Sarah Fall was "in no position to question" the transfer from Edmund Fall to Elizabeth Eastin. *Id.* at 135, 113 N.W. at 181.

In any event, the Nebraska court was not free to apply Nebraska law to determine what persons were bound by a Washington judgment where the judgment was entitled to full faith and credit, as Mr. Justice Holmes assumed. The effect of such a judgment should have been determined in the first instance by the law of the rendering state, Washington. But since the question of what parties were bound was really a jurisdictional question, the Washington law would have had to satisfy the Supreme Court's tests of due process of law. See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912).

Why did Mr. Justice Holmes assume such an indefensible position? One guess is that, knowing the majority opinion was vague and incoherent, he decided upon the judicial strategy of attempting to narrow the effect of the decision so it could be distinguished in subsequent cases where the claim of a third party was not involved. This is what has actually happened in some of the state courts. See, *e.g.*, McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961).

60. See Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 650–56 (1954).

61. The practical aspects of this problem have been thoroughly thought through by Currie, *id.* at 638–41, 663–65, who argues that courts of the forum-situs cannot be expected to permit the foreign decree to be recorded in the forum state because a title examiner would have no way of knowing whether the foreign court had acquired jurisdiction over the parties or was competent to render the decree under its domestic law. The governmental interest of the situs in the marketability of its land requires that its policy should prevail to this extent. Moreover, if the contumacious defendant should execute a transfer to a good-faith purchaser, he ought to receive whatever protection the law of the situs accords him; the interest of the situs state in the security of titles acquired by good-faith purchasers should also prevail. In short, this problem, like the other problems considered in this Article, should be resolved by a reasonable accommodation of the governmental interests of the situs, *where they are affected*, and the federal interest in interstate recognition of judgments. It ought not to be solved by a sweeping dogma that denies all efficacy to a foreign decree affecting rights in local land.

62. "If the Washington decree bound the conscience of E. W. Fall, so that when he left the jurisdiction of that state any deed that he might make would be *absolutely void*, and had he sold the land to an innocent purchaser, who had inspected the records and found that he was the owner in fee of an undivided one-half interest to the premises, such purchaser, though relying on the laws of this state for his protection, would receive *no title*. This is the contention of the appellee, *carried to its ultimate conclusion* . . . ." Fall v. Fall, 75 Neb. 120, 133, 113 N.W. 175, 180 (1907). (Emphasis added.) This all sounds suspiciously like the tired old "thin edge of the wedge," "Where shall we draw the line?" sophistry. For a more charitable explanation see Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 638–41 (1954).

63. 162 Tex. 190, 345 S.W.2d 722 (1961).

husband to convey to his wife a one-third interest in certain land located in Texas. Had a Texas court granted the divorce it would have had no power to order such a conveyance. Article 4638 of the Texas Revised Statutes, regulating the division of property on divorce, provided: "Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."[64] Reversing two lower courts, the Supreme Court of Texas held that "as a matter of comity we will enforce the equitable decrees of a sister state affecting Texas land so long as such enforcement does not contravene an established public policy in this State."[65] Applying this principle to the case before them, the court held that the enforcement of a sister-state decree distributing the Texas real property of nonresident spouses upon divorce did not contravene the public policy of Texas.

In a lengthy dissenting opinion Justice Griffin obligingly restated the losing arguments. *Clarke v. Clarke* and *Fall v. Eastin* were, of course, referred to; the "anxious fear" fantasy made its inevitable appearance.[66] The principal argument of the dissent was the familiar fallacy of *Clarke v. Clarke*:

> In our case Article 4638, R.C.S., 1925, expresses the public policy of this State and such statute absolutely prohibits our Texas courts "to compel either party to divest himself or herself of the title to real estate." . . . *Surely we are not going to hold that the Oklahoma courts can do what the Texas courts are prohibited from doing.* . . . I cannot bring myself to penalize and discriminate against Texas citizens by such so called legal legerdemain.[67]

The majority found this argument totally unconvincing. Speaking through Justice Norvell, they said:

> Article 4638 establishes a policy governing Texas courts in cases involving divorce and property rights based upon the marital laws of this State. It does not purport to establish a public policy relating to land tenure by nonresidents. . . . [W]hat difference does it make to the State of Texas whether the property here involved is awarded to the ex-husband or the ex-wife of a broken Oklahoma marriage? Is there in Texas a public policy which perfers [*sic*] land tenure by males rather than by females? Is there a reasonable probability of the return of feudal tenures to Anglo-American jurisprudence, so that one owning land would be burdened with knight service? . . . It would seem that Texas should have no concern with the statutes and methods adopted by Oklahoma in settling the matrimonial differences of its citizens and their property rights.[68]

The majority also emphasized the mutual interdependence of the states in securing the application of their laws to cases involving their citizens and the desirability of encouraging reciprocity. "We expect other states to recognize our system of marital property ownership, so should we respect their schemes of

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64. TEX. REV. CIV. STAT. art. 4638 (1960).
65. McElreath v. McElreath, 162 Tex. 190, 207–08, 345 S.W.2d 722, 733 (1961).
66. "In conclusion, I believe we will have more certainty to land titles and less confusion if Texas continues her present policy of determining the title to Texas lands in accordance with its law and decrees, rather than permitting decrees of the other states to affect titles to Texas lands." *Id.* at 223, 345 S.W.2d at 743 (dissenting opinion).
67. *Id.* at 216–17, 345 S.W.2d at 739. (Emphasis added.)
68. *Id.* at 194, 199, 345 S.W.2d at 724, 728.

property ownership and attendant plans for the adjustment of property rights upon the dissolution of a marriage."[69]

The *McElreath* case has been interjected into the chronological discussion of Supreme Court cases because it strikes a very heavy blow at the fallacious doctrine of *Clarke v. Clarke* and *Fall v. Eastin* that states cannot be expected to recognize a sister-state judgment affecting the title to local land if it enforces a rule of law different from that of the situs. For in the *McElreath* case the half-century-old immunity from constitutional obligation proffered in the two earlier cases was rejected by a state court on the ground that it preferred to cooperate with courts of other states by enforcing their laws where the rights of their citizens were involved, expecting that those courts would accord similar treatment to Texas citizens. This surely suggests that there is something woefully wrong with the assumptions regarding state policy made in the two earlier cases. Moreover, while the Texas court used the term "public policy" rather than "governmental interest," its technique of analysis was essentially that of the more recent Supreme Court opinions applying the full faith and credit clause; the court said, in effect, that Texas had no governmental interest in the distribution on divorce of Texas real property owned by nonresidents, whereas the state of their domicile did have a substantial interest in such distribution. In short, the *McElreath* case strongly suggests two propositions: First, that the immunity from constitutional obligation carved out by the *Fall* and *Clarke* cases is undesirable and inimical to the true interests of the states, which are more concerned with the rights of their citizens than with the distribution of their land on death or divorce; second, that the two earlier cases are not consistent with the constitutional principles embodied in the Supreme Court's later decisions.

C. *Olmsted v. Olmsted*

Though *Olmsted v. Olmsted*,[70] decided by the Supreme Court in 1910, purported to rely heavily upon *Clarke v. Clarke* and *Fall v. Eastin*, the actual decision was in accord with the principle of the Court's later decisions that a state is free to apply its domestic law in a choice-of-law situation only where it has a legitimate governmental interest in the result. The essential question of the case was the construction of the will of Silas Olmsted, who had died domiciled in New York in 1874, devising a one-half interest in New York land to his son Benjamin Olmsted for life with remainder to the "lawful issue" of Benjamin. At that time Benjamin was domiciled in New York, married and the father of four children. Soon afterward he abandoned his wife and fathered two sons, born out of wedlock, by a paramour. In 1882, while domiciled in Michigan, he obtained a Michigan divorce from his wife and married his paramour. Under a Michigan statute enacted in 1881, this marriage legitimized their two sons.[71]

69. *Id.* at 193–94, 345 S.W.2d at 724. The doctrine of comity or reciprocity was eloquently expressed by Story. See Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1102–04 (1956). Unfortunately, the doctrine plays no part in his discussion of choice-of-law problems relating to land. Thus, its application in the present context by the Texas court, while breaking new ground, at the same time stands in a great tradition.

70. 216 U.S. 386 (1910).

71. MICH. COMP. LAWS § 27.3178(153) (1962).

On the termination of Benjamin's life estate in 1905 a partition suit to which all his children were parties was begun in the New York courts, thus raising the question whether the two sons of Benjamin and his second wife were his "lawful issue" within the meaning of his father's will.

Apart from its choice-of-law aspects this problem was of a type fairly common in the law of wills; a situation unforeseen by a testator had arisen for which his will made no provision. In the absence of admissible evidence regarding a testator's intention the state must resolve such problems by a dispositive rule of law, as it does in the case of intestacy. The state of a testator's domicile has a legitimate concern with filling the gaps in his will according to the customs and traditions of the community. The rule formulated will normally be one which the lawmaking authority considers appropriate to fulfill the desires of the average member of the community in the testator's situation.[72] By the law of New York at the date of Silas Olmsted's death, children born out of wedlock were indelibly illegitimate; the subsequent marriage of their parents could not change their status. The Court of Appeals of New York held that the meaning of the words "lawful issue" should be determined by the law of New York as it stood when the testator died; hence Benjamin's two sons by his second wife could not be included.[73]

On behalf of these two sons it was contended in the United States Supreme Court that the New York court's decision denied full faith and credit to a statute of Michigan—the domicile of Benjamin, his second wife, and their sons at the time of the marriage. This statute, as we have seen, had the effect of legitimizing the two sons. Today, such an argument would be easily answered; New York, having a legitimate governmental interest in the application of its law to the construction of the will of a New York domiciliary, was not obliged to give effect to the law of Michigan. But in 1910 the notion of full faith and credit to statutes was itself something of a novelty, and the doctrine of governmental interests as a touchstone for this constitutional obligation had not yet been evolved. Counsel for the four children of the first wife shrewdly relied upon a doctrine then much in vogue and supported by two contemporaneous decisions of the Court. "To permit the Michigan statute to control in determining who are the lawful issue of Benjamin Olmsted . . . would be a recognition of the right of the legislature of Michigan to legislate with respect to the disposition of real estate located in New York, and would lead to much confusion, and tend to upset land titles."[74] Counsel's forensic wisdom was confirmed by the unanimous opinion of the Supreme Court which, after carefully summarizing *Clarke v.*

72. See RHEINSTEIN, CASES ON DECEDENTS' ESTATES 597–602 (1947).

73. "Recently many of our sister states have adopted statutes similar to those of France, providing that the subsequent marriage of the parents legitimized the child or children previously born. Such a statute was adopted in Michigan in 1881 and in this state in 1895. These statutes, however, were passed long after the death of Silas Olmsted and the admitting of his will to probate, under which his legitimate grandchildren became vested as remaindermen in the estate left by him . . . ." Olmsted v. Olmsted, 190 N.Y. 458, 465, 83 N.E. 569, 570 (1908). The case was further complicated by the failure of the Michigan divorce court to obtain *in personam* jurisdiction over Benjamin Olmsted's first wife, with the result that New York was not obliged to give full faith and credit to the divorce decree under the rule of Haddock v. Haddock, 201 U.S. 562 (1906).

74. Olmsted v. Olmsted, 216 U.S. 386, 389 (1910) (argument of counsel for defendants in error).

Clarke and *Fall v. Eastin*, held that since New York would not have been obliged to enforce a Michigan judgment affecting local real property, it need not accord full faith and credit to the Michigan statute.[75]

D. *Hood v. McGehee*

Hood v. McGehee,[76] decided by the United States Supreme Court in 1915, was also a case in which the strong governmental interest of one state was not even discussed. Upon the death of George T. McGehee, who was at all material times domiciled in Mississippi, his two adopted children instituted proceedings in an Alabama federal court to establish their claim to inherit his Alabama real property. By a holographic will, invalid in Alabama,[77] he had given them virtually his entire estate. Under Mississippi law the children, who had been adopted by notarial act in Louisiana, were entitled to inherit McGehee's property, but at that time the Supreme Court of Alabama had placed upon its local statutes the curious construction that though children adopted in Alabama could inherit real property from their adopting parents, children adopted in other states could not.[78] From a modern point of view Mississippi had a substantial interest in seeing that the property of its deceased citizen should be distributed to his adopted children as he intended it to be. On the other hand, it is impossible to conjure up any legitimate interest of Alabama in its senseless and provincial policy of discrimination against children adopted in other states.

A governmental interest analysis such as this had scarcely been thought of in 1915; counsel for the adopted children did not even suggest that the Mississippi statute of descents was entitled to full faith and credit. Instead they argued that the Louisiana notarial act that purported to confer the right of inheritance was entitled to full faith and credit. Assuming that a notarial act fell within the category of "public acts, records and judicial proceedings," it was certainly not the equivalent of a judicial decree in adversary proceedings. Moreover, since McGehee and his children were domiciled in Mississippi, Louisiana's interest, if any, in the transfer of his property to them on death was trivial compared to that of Mississippi. The Supreme Court rejected the adopted children's contention. In a short opinion Mr. Justice Holmes restated the principle of the earlier cases

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75. "The full faith and credit clause of the Constitution applies with no more effect to the legislative acts of a foreign State than it does to the judgments of the courts of such State." *Id.* at 394–95.

76. 237 U.S. 611 (1915).

77. The holographic will was valid under Mississippi law and had been probated there. *Id.* at 614. A strong policy argument can be made in favor of the recognition at the forum-situs of a will that is void under local law but valid under that of the testator's domicile, and many states have legislation to this effect. See Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095–102, 1106 (1965).

78. See Hood v. McGehee, 189 Fed. 205, 206 (N.D. Ala. 1911); Brown v. Finley, 157 Ala. 424, 47 So. 577 (1908). The Alabama rule was contrary to the view generally prevailing in other states. The leading case propounding the majority view is Ross v. Ross, 129 Mass. 243 (1880). For other decisions to the same effect see Annot., 73 A.L.R. 964 (1931).

The pointless and unreasonable discrimination of the Alabama law suggests that it involved a violation of the privileges and immunities clause of the federal constitution. See Currie & Schreter, *Unconstitutional Discrimination in Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1347–49, 1390–91 (1960).

with rhetorical flourish. "Alabama is sole mistress of the devolution of Alabama land by descent."[79]

E. *Summary*

Through these four cases, all decided more than half a century ago, runs one persistent theme, the doctrine that a state's sovereignty would be seriously invaded if it were not permitted to apply its own law to all questions affecting title to its land. The doctrine was and still is empirically unsound; American state courts have at times referred such questions to the laws of other states without any ill results. That the doctrine is inconsistent with the principles of full faith and credit to foreign law recently enunciated by the Supreme Court is demonstrated by the foregoing analysis of each of the four cases. In *Hood v. McGehee* Mississippi, as the domicile of the decedent and his two adopted children, had a substantial interest in securing to them the inheritance of his Alabama land, but the law of Alabama—which had no interest at all—was allowed to prevail. *Olmsted v. Olmsted* reached the right result, but for the wrong reason: New York had an interest because the testator had been a member of that political community—*not* because the land was located there. In the *Fall* and *Clarke* cases courts of the forum-situs cavalierly disregarded judgments of sister states applying their own laws in situations where the sister states had a substantial interest, while the forum-situs states had none. These two old cases are also out of harmony with the policy of res judicata which the Court has so strongly emphasized in recent decades.[80]

One final objection to the doctrine of these cases remains to be considered. In order to transform the doctrine into a principle of immunity from the constitutional obligation of full faith and credit to judgments, the judges turned it into a rule of jurisdiction. They held that issues of law or fact determined by a nonsitus court need not be treated as res judicata by the courts of the situs because a nonsitus court *has no jurisdiction to determine such issues.*[81] Thus the doctrine which purported to protect the sovereignty of the situs against the application of nonsitus law was extended, in theory at least, to cover cases where the nonsitus court had actually applied the law of the situs. In such cases questions of fact, which the parties had already litigated, would be open to relitigation at the situs.

In short, the apparent effect of these four old cases has been to add to the law of full faith and credit two drastic and ill-founded propositions: First, that in litigation at the situs of land concerning title thereto, issues of law or fact determined by a nonsitus court need not be given any res judicata effect; second,

79. Hood v. McGehee, 237 U.S. 611, 615 (1915).

80. For a recent summary of this line of cases see Durfee v. Duke, 375 U.S. 106, 111-16 (1963).

81. "[T]he decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a *want of jurisdiction* in the court of South Carolina *over the particular subject-matter* which was sought to be concluded in Connecticut by such decree." Clarke v. Clarke, 178 U.S. 186, 195 (1900). (Emphasis added.) "[W]e think that the doctrine that the court, *not having jurisdiction of the res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established." Fall v. Eastin, 215 U.S. 1, 11 (1909). (Emphasis added.)

that in such litigation the courts of the situs need not give full faith and credit to the statutes or common law of another state.

III. A Modern Analysis

A modern analysis of full faith and credit in the real property field should distinguish at least five types of cases, three involving foreign judgments and two involving foreign statutes or judicial decisions. The first type of case would be one in which a court, applying the law of the situs, has undertaken to determine the rights of parties subject to the forum's jurisdiction relating to land in another state. In subsequent litigation at the situs the court has been asked to treat the former adjudication by the nonsitus court as conclusively settling all issues of law and fact between the parties. Such a case would be distinguishable on its facts from the *Clarke* and *Fall* cases because in those cases the nonsitus court did not apply situs law. But the sweeping pronouncements of those cases include a claim that in this hypothetical situation the nonsitus court would have had *no jurisdiction* to determine such issues although it had *in personam* jurisdiction over all interested parties.

These pronouncements are in hopeless conflict, however, with the long-established practice of courts of equity, sanctioned by the Supreme Court itself,[82] under which a defendant personally before the court is compelled to execute a conveyance of his interest in land situated in another state.[83] That this practice is in every respect a lawful and constitutional exercise of judicial power cannot be disputed. The conclusion seems inescapable that if the defendant has executed a conveyance in obedience to such a decree, the courts of the situs may not constitutionally hold that the execution was an ineffectual act because the foreign court had no jurisdiction to compel its performance.[84] The conclusion seems likewise inescapable that even if the defendant has eluded the power of the court of equity and has refused to execute the conveyance, the courts of the situs are constitutionally obligated to treat the former proceedings as res judicata with respect to all issues of fact determined therein and as imposing a binding obligation on the defendant to obey the decree. Can it be seriously contended that, although the court of equity had jurisdiction to compel the defendant to convey the property, it had no jurisdiction to decide the issues of fact on whose adjudication its decree necessarily rested or to impose any enforceable obligation on the defendant,[85] so that if he should elude the officers of the court, all goes for

82. The classic case is Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810) (Marshall, C.J.).

83. This conflict has been the subject of a great deal of commentarial debate, some of it largely beside the point and quaintly impractical. The views of various writers are restated and considered in Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620 (1954).

In the *Clarke* and *Fall* cases the Supreme Court noted the established equity practice as constituting some kind of an exception to its sweeping pronouncements but made no attempt to define its limits or to reconcile it with those pronouncements. See Fall v. Eastin, 215 U.S. 1, 10 (1909); Clarke v. Clarke, 178 U.S. 186, 193 (1900).

84. This proposition has seldom, if ever, been questioned. See Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620, 630–31 (1954).

85. Chief Justice Sedgwick of Nebraska remarked in his dissent to *Fall v. Fall*: "The decree [of the nonsitus court] is binding upon the conscience of the parties. In what sense is it binding upon the conscience? Would the consciences be released from obligation of this decree as soon as they crossed the

naught?[86] Once more we find ourselves expected to believe impossible things.

The traditional chancery practice is clearly desirable because it provides a more convenient forum in cases where lengthy litigation at the situs would be expensive and burdensome for the parties. To permit one of the parties to disobey the decree after he has had his day in court is to disregard the basic policy of the full faith and credit clause. When an issue of fact has been litigated and decided in the courts of one state, it is both futile and unfair to allow the losing party to relitigate it in another.[87] While it does not deal directly with the present question, the Supreme Court's recent decision in *Durfee v. Duke* demonstrates very clearly that adjudicated issues of fact affecting title to land are *not* subject to any mystical immunity from the full faith and credit clause or from the policy of res judicata which the Court has continually emphasized during the last three decades.[88] There is no valid reason why the judgment of a court that has jurisdiction over the parties and that has applied the law of the situs and decided the indicated issues of fact should not be entitled to full faith and credit at the situs.[89]

The second type of case requiring separate consideration is that in which a nonsitus court with jurisdiction over the parties has applied its own domestic

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state line? If their consciences are affected and bound by the decree it would seem that they would be so bound until they complied with the decree. If litigants come before the courts of equity of this state and concede that they are in conscience bound to acknowledge the rights and interest of their adversary in the matter in dispute, what is the duty of the court of equity? It is for no other purpose that courts of equity are established. It is to compel litigants to do what they are in conscience bound to do." 75 Neb. 120, 148, 113 N.W. 175, 185–86 (1907).

86. Mr. Justice Norvell, speaking for the majority in *McElreath v. McElreath*, remarked: "A competent court of that state [Oklahoma] having acted, and presumably having made a proper and equitable adjustment of the property rights of the divorcing parties, it is anomalous, to say the least, to assert that the work of that court may be set at naught by the defendant's crossing the state line and coming to Texas. There is no doubt but that had he remained in Oklahoma, the decree could and would have been enforced by contempt proceedings. As a matter of justice, good order and common sense, the Oklahoma decree should be enforced in Texas, unless contrary to some well defined public policy of this State. There is something incongruous and out of keeping with the concept of orderly processes to tolerate a situation wherein solemn court decrees may be flouted by playing hop-skip with state boundaries," 162 Tex. 190, 193, 345 S.W.2d 722, 724 (1961).

87. "It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

88. "To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. . . . But no such overriding considerations are present here. While this court has not before had occasion to consider the applicability of the rule . . . to a case involving real property, we can discern no reason why the rule should not be fully applicable." Durfee v. Duke, 375 U.S. 106, 114–15 (1963). (Citations omitted.)

89. This thesis, as applied to probate and other decrees affecting the distribution of real property on death, is supported by Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221, 251–54 (1944).

A formalistic but extremely influential tradition requires that orders and decrees of a nonsitus court be drafted with great care so that the court does *not* appear to be directly declaring what right, title, or interest the parties have in the foreign land. The court must not appear to be disposing of the title to foreign land *as if* it were part of the soil of its own state. Only the situs court has that power. Thus in the *McElreath* case, although the Texas court was prepared as a matter of comity to enforce the Oklahoma court's order that Mr. McElreath convey to his wife a one-third share in his Texas land, the court thought it necessary to scrutinize the Oklahoma decree very carefully and to point out its intended operation was strictly *in personam*. 162 Tex. 190, 195–98, 245 S.W.2d 722, 725–27 (1961). For an excellent illustration of what to avoid in drafting such a decree see the corrections in the trial court's decree made by Justice (now Chief Justice) Traynor in Rozan v. Rozan, 49 Cal. 2d 322, 332–33, 317 P.2d 11, 16–17 (1957). The subject is thoroughly discussed in Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 639–41, 671–73 (1954).

law to reach a result that conflicts with the policy of the law of the situs. This is the type of case that has occasioned so much apprehensiveness on the part of judges and commentators. Since most courts have a healthy respect for the power of the situs court, actual examples of this type of case are hard to find, but a hypothetical one will serve. Suppose that *M*, a married woman, resides in state *D*, whose law prohibits a married woman from conveying her real property unless her husband joins in the conveyance. *M* owns valuable real property situated in state *S*, whose law permits a married woman to convey her real property as if she were a *feme sole*. *M* sells and conveys this real property to *P* without the consent or concurrence of her husband, *H*. *P* records his deed in state *S* and resells the real property to *B*. *B* and *P* are both domiciled in state *R*, whose law is the same as that of state *S*. *M* and *H* bring suit in the state *D* courts against *P* and *B*, praying that they be ordered to reconvey the real property to *M*. The state *D* court, having *in personam* jurisdiction over *P* and *B*, decides to apply its own law and grants the relief prayed for. *P* and *B* do not execute the conveyances.

M and *H* then bring suit against *P* and *B* in state *S*, praying that the decree of the state *D* court be carried into effect.[90] The state *S* court dismisses the action on the ground that the enforcement of the state *D* law through the medium of the state *D* judgment would contravene the policy of the state *S* law. One of the purposes of that law, according to the state *S* court, is to facilitate the free circulation of land by enabling married women to dispose of it without restraint and by enabling purchasers to take title from an adult female grantor without inquiry into her marital status.

If this case were carried to the Supreme Court,[91] it would have to decide whether the general policy of res judicata should prevail over the local land circulation policy of state *S*, which has a legitimate interest in the enforcement of that policy. It is not the purpose of this Article to take a position on this difficult and delicate question.[92] What is here insisted upon is that this type of case, in which the situs state has a genuine governmental interest, is essentially different from other types of cases in which it has none. The persistent error of the *Clarke* and *Fall* cases was to emphasize the interference with the policy of the situs state that

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90. For practical suggestions as to the proper form of action at the situs see Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 673–77 (1954).

91. When the Supreme Court *does* decide to hold, for the first time, that a particular foreign land decree should receive full faith and credit at the situs, the decision is not likely to be made in a case of this type. The initial decision will probably come in the easy case where no argument, save that of adherence to precedent, can be advanced against recognition of the decree, as where the situs state has *no reason* to desire the application of its law or where, after protracted and costly litigation, a nonsitus court has applied the law of the situs.

92. "The Court has said that the [full faith and credit] clause does not state an inexorable command, that the Court is the final arbiter, and that there may be exceptions from its operation. Thus, in the remote event that a court of a sister state were to repudiate the law of the situs in a matter importantly affecting a substantial land policy of the situs; and the Supreme Court were to refuse review on the ground that no federal question is involved; and the courts at the situs were to refuse effect to the foreign decree; only the Supreme Court could require that it be given effect, and it would still be open to the Court to hold that, in the particular case, the policy of the situs state should prevail." Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 643 (1954).

The law is, of course, otherwise as to money judgments. It is no defense to a suit upon such a judgment rendered by the court of a sister state that the state where enforcement is sought had the sole governmental interest in the outcome and that its law and policy were repudiated. Fauntleroy v. Lum, 210 U.S. 230 (1908).

this type of case would entail and then to dispose of all five types of cases as if they all posed the same problem. In the words of the old proverb, the Supreme Court threw out the baby with the bath water.

The third type of case is that in which a nonsitus court with jurisdiction over the parties has applied a rule of its domestic law which, though different from the law of the situs, does not conflict with any policy of the situs because the situs has no interest in the application of its policy. The *Clarke* and *Fall* cases are perfect examples of this type. In those cases the judges seem to have thought that because the judgment enforced a rule of law *different* from that of the situs a conflict of policies would result and the case would be similar to case two. But modern analysis has made the distinction very clear—where the parties are nonresidents and the policy of the situs does not concern the use, tenure, or marketing of its land, there is no real conflict. From a practical point of view this type of case is analogous to case one and should be similarly treated. *Clarke v. Clarke* may stand for the time being upon the narrower of its two alternative grounds; *Fall v. Eastin* should be overruled.

The fourth type of case does not involve a foreign judgment. In an original action brought at the situs the court has been asked to enforce a law of another state which would conflict with the governmental policy of the situs state, because the situs state has an interest in the enforcement of its policy. Our hypothetical example involving a married woman's conveyance would illustrate this type of case if we supposed that *H* and *M* took no proceedings in state *D*, but instead brought suit in state *S*, praying that the conveyances by *M* and *P* be set aside and the title quieted in *M*. Since the state *S* law was designed to facilitate the transfer of real property by removing all marital restrictions on the power of an adult female to convey title, state *S* would have a legitimate interest in the application of its law. Though none of the four old cases is precisely in point,[93] their broad pronouncements would support the power of the state *S* court constitutionally to apply its own law on the simplistic ground that the title to state *S* land is at stake. The more recent decisions of the Supreme Court outside the field of land titles would support the power of the state *S* court upon the more discriminating ground of the state *S* governmental interest.

The fifth type of case is that in which a court of the situs has been asked to enforce a law of another state, different from its own, but not in conflict with the policy of the situs state because that state has no interest in the application of its policy. The *Hickok* case, discussed at the beginning of this Article, admirably illustrates this type: Ohio had a substantial interest in the enforcement of its deathbed-gift law because the testator, his devisees, and his heirs were all Ohio residents, while Texas, the situs of the land devised, had no interest. The Supreme Court of Texas, however, refused to apply the Ohio statute, and the Supreme Court denied certiorari. Of the Court's four older decisions *Hood v. McGehee* is most directly in point; however, like the other three, it rested upon the mistaken

93. In *Olmsted v. Olmsted* the forum-situs (New York) had an interest in the application of its policy, but that policy was not one relating to the use or marketing of land. New York's policy related to the construction of wills, and its interest encompassed the particular case because the testator was a citizen of New York. In the hypothetical example of the text a land circulation policy of the forum-situs is at stake.

notion that the enforcement at the situs in real property litigation of foreign laws which *differed* from those of the situs would necessarily violate some governmental policy of the situs. Traces of this notion appeared in the Texas court's opinion in the *Hickok* case.[94] It is both ironical and instructive that only seven years later the Supreme Court of Texas in *McElreath v. McElreath* emphatically rejected, in the context of a divorce property distribution, the simplistic doctrine of the four old cases which had shielded its shortsighted decision in the *Hickok* case from the obligation of the full faith and credit clause.[95] *Hood v. McGehee*, like *Fall v. Eastin*, should be overruled.

It is a curious characteristic of conflict of laws in the United States that, though its problems are of constitutional and international importance, the volume of litigation is relatively small. As a result, judges and practitioners are inclined to rely heavily upon the text writers, most of whom are inclined to rely too uncritically upon the aphorisms of their predecessors. Yet the Supreme Court, though concerned only with constitutional limitations and located at the top of an expensive litigation ladder, has evolved a technique of analysis which modern judges and commentators are finding extremely useful. Through the writings of Professor Freund,[96] Professor Currie,[97] Chief Justice Traynor,[98] and others, the governmental interest analysis has been applied to the "petrified forest"[99] of traditional formulas with illuminating results. The highest courts of several states have also adopted the governmental interest analysis,[100] presumably because they found it helpful in understanding the real policy issues of choice-of-law cases. The opposition to this trend has been insignificant;[101] further developments in the same direction seem inevitable. In the light of governmental interest analysis the reasoning of the four old cases dissected in this Article appears indiscriminate and needlessly frustrating to the policies of nonsitus states. Paradoxically, it is the Supreme Court itself which has made it impossible to believe any longer[102] in the "land taboo" embodied in its earlier decisions.

94. See text accompanying note 9 *supra*.
95. See text accompanying notes 63–69 *supra*.
96. Freund, *Chief Justice Stone and Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).
97. CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963).
98. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).
99. Chief Justice Traynor's felicitous phrase. *Id.* at 670.
100. See Bernkrant v. Fowler, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963); Lilienthal v. Kaufman, 239 Ore. 1, 395 P.2d 543 (1964); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
101. See Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960). For Currie's response see Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1961). A Delaware court has recently refused to follow the *Babcock* and *Wilcox* cases. See Friday v. Smoot, —— Del. ——, 211 A.2d 594 (1965).
102. The disbelief of modern courts is illustrated by Rozan v. Rozan, 49 Cal. 2d 322, 331, 317 P.2d 11, 16 (1957), in which the Supreme Court of California declared (by way of dictum) that its decree, issued in a divorce suit between two California residents, ordering the husband to convey to the wife certain land in North Dakota, would be entitled to full faith and credit in a North Dakota court. *Fall v. Eastin* was distinguished on the ground that because the Washington court ordered a commissioner to execute a conveyance of the Nebraska land, that court had "directly affected title to land in Nebraska." See note 89 *supra*.